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2 UNITED STATES BANKRUPTCY COURT
3 EASTERN DISTRICT OF WASHINGTON

4 In re:)
5 METROPOLITAN MORTGAGE &)
6 SECURITIES CO., INC.,) Jointly Administered Under
7 Debtor.) No. 04-00757-W11

8 In re:)
9 SUMMIT SECURITIES, INC.,) MEMORANDUM DECISION RE:
10 Debtor.) THOMAS G. TURNER'S EMERGENCY
11) MOTION FOR RELIEF FROM STAY
AND FOR PAYMENT OF DEFENSE
COSTS (Docket No. 8068)

12 On September 22, 2005, a federal grand jury in Seattle
13 returned an indictment against Mr. Thomas G. Turner, former
14 President of Summit Securities, Inc., one of the debtors in the
15 administratively consolidated Chapter 11 cases. On September 26,
16 2005, the Securities and Exchange Commission (hereinafter "SEC")
17 commenced an action against Mr. Turner and others. Both actions
18 alleged violations of federal securities law. Trial has been
19 scheduled on the criminal charges for December 5, 2005. In order
20 to adequately prepare a defense to the criminal charges, Mr. Turner
21 needs the assistance of counsel as soon as possible.

22 On September 30, 2005, Mr. Turner filed a motion seeking to
23 lift the automatic stay to allow him to present an order in the
24 pending adversary proceeding *National Union Fire Ins. Co. of*
25 *Pittsburgh, P.A., et al. v. Metropolitan Mortgage & Securities Co.,*
26 *Inc., et al.*, No. 05-80135-PCW. That order would authorize
27 disbursement of \$300,000 from the interpled insurance proceeds to
28 Mr. Turner's counsel to fund the defense of the criminal and SEC
MEMORANDUM DECISION RE: . . . 1

1 actions. Contemporaneously with the Motion to Lift Stay, Mr.
2 Turner made a request in the interpleader action for the entry of
3 such an order once the automatic stay was no longer applicable.

4 Mr. Turner has been represented by the law firm of Davis
5 Wright Tremaine, LLP, in various civil actions relating to his
6 involvement with the debtor. That firm would also provide
7 representation in the criminal and SEC matters. Mr. Turner and the
8 law firm have agreed that the representation would be undertaken
9 upon receipt of a retainer of \$300,000. That is not a flat fee for
10 all defense of the criminal and SEC matters, but a classic
11 retainer, i.e., a deposit of funds which would be reduced as the
12 law firm would provide services, bill for those services and then
13 satisfy the bill from the deposit. It is possible that the amounts
14 due for the representation would be less or greater than the
15 retainer. Mr. Turner lacks the personal financial resources to pay
16 the retainer.

17 The \$300,000 distribution is sought from the National Union
18 policy proceeds, which policy (commonly referred to as a D&O
19 policy) was originally in the amount of \$10,000,000. There is also
20 an excess \$5,000,000 D&O policy issued by St. Paul (Adversary No.
21 05-80138-PCW). Theoretically, there is \$15,000,000 available to
22 pay all claims under those policies. Prior to interpleading the
23 funds, National Union distributed \$722,131.87 in policy proceeds as
24 payment of various defense costs incurred by non-debtor insured
25 under the policy in civil litigation. The Chapter 11 and Chapter 7
26 debtors are in the process of quantifying their claims under the
27 policies as named insured but have previously made requests for
28 \$3,139,347.

MEMORANDUM DECISION RE: . . . 2

1 As a result of similar motions to lift stay brought by non-
2 debtor insured seeking payment of defense costs in civil litigation
3 from the policy proceeds, this Court has ruled that the stay should
4 be lifted and orders entered in the National Union interpleader
5 action, Case No. 05-80135-PCW, to pay defense costs incurred prior
6 to June 30, 2005. That was the approximate date of the decision
7 entered by this Court which held that the insurance policy proceeds
8 were property of the estate. In previous similar motions to lift
9 stay, this Court determined that as non-debtor named insured and
10 their counsel had relied upon the policy proceeds for payment of
11 defense costs prior to that decision, fairness and equity required
12 distributions from the policy proceeds for defense costs incurred
13 before June 30, 2005. To date, \$984,912.55 has been approved for
14 distribution from the National Union policy to reimburse costs of
15 defense incurred prior to June 30, 2005. Additional applications
16 for reimbursement are pending. This specific Motion to Lift Stay
17 now seeks distribution for costs of defending criminal charges
18 which are in the process of being incurred or yet to be incurred.

19 It has been apparent for some time that the insurance proceeds
20 of the National Union and St. Paul policies will not be sufficient
21 to pay all claims and possibly could be insufficient to pay all
22 defense costs incurred by non-debtor named insured.

23 The Chapter 11 debtors and their Unsecured Creditors'
24 Committees, the Trustee for the Chapter 7 debtor, and a group of
25 plaintiffs in the pending civil litigation against non-debtor named
26 insured objected to the current Motion to Lift Stay. Their
27 position is that the stay should remain in effect as Mr. Turner,
28 under the terms of the policy, is not entitled to receive this

MEMORANDUM DECISION RE: . . . 3

1 distribution and that any non-debtor named insured should be
2 precluded from receiving any distribution for reimbursement of
3 defense costs incurred after June 30, 2005. The basis for the
4 latter position is that allowing distributions would deplete the
5 policy proceeds before many claimants had an opportunity to bring
6 their claims, whether those claimants are other non-debtor named
7 insured or eventual holders of judgments against the non-debtor
8 named insured.

9 **ISSUES**

10 1. Does the National Union policy provide coverage, i.e., a
11 right to receive a distribution from the proceeds, for the costs of
12 defending against the criminal and SEC matters?

13 2. If so, does the policy only allow reimbursement for
14 defense costs after they are incurred or does it allow a named
15 insured to receive policy proceeds for purposes of providing a
16 retainer for future services?

17 3. Does cause exist to lift the stay pursuant to 11 U.S.C.
18 § 362(d) to allow distribution of policy proceeds to Mr. Turner?

19 **FIRST ISSUE**

20 Exclusion 4(c) to the National Union policy provides that
21 payments will not be made on losses arising from a claim against
22 one of the named insured if the claim is one:

23 (c) arising out of, based upon or attributable to the
24 committing in fact of any criminal, fraudulent or
25 dishonest act, or any willful violation of any statute,
rule or law; . . .

26 The objecting plaintiffs in the securities civil litigation
27 argue that as there is substantial evidence of Mr. Turner's
28 fraudulent, criminal or dishonest acts, it would be inequitable to

MEMORANDUM DECISION RE: . . . 4

1 allow this distribution as such would deplete the funds which are
2 available to pay the victims of those fraudulent, criminal or
3 dishonest. Only after a finding that Mr. Turner did not, in fact,
4 commit such acts, should he be reimbursed. Mr. Turner argues that
5 the policy, by use of the phrase "in fact", contemplates
6 distribution for reimbursement of defense costs until an
7 adjudication is made that such acts occurred. After a finding that
8 "in fact" such acts occurred, the insured would have a duty to
9 repay the amount of policy proceeds received but prior to such
10 adjudication defense costs must be paid from the policy.

11 Resolution of this issue requires application of insurance law
12 and interpretation of the terms of the insurance policy.

13 SECOND ISSUE

14 The debtors, Committees, and Trustee argue that any
15 distribution to Mr. Turner or any other non-debtor insured at this
16 time, undermines the intent of the interpleader. The purpose of
17 the interpleader was to develop an orderly, coordinated
18 distribution of policy proceeds to protect the debtors' (and all
19 claimants') interests in the proceeds. Piecemeal distribution is
20 contrary to that purpose and nullifies the benefit of the
21 interpleader. Additionally, these objecting parties raise the same
22 issue as the other objecting parties. They argue that as the
23 policy pays defense costs "as incurred", the policy does not allow
24 the payment of a retainer for future services. Only after the
25 legal services are provided and billing statements produced and
26 approved would the policy allow distributions to pay for such
27 services. Mr. Turner's response is that, as he is unable to obtain
28 the services of Davis Wright Tremaine, LLP, in the criminal and SEC

MEMORANDUM DECISION RE: . . . 5

1 matters without providing a retainer of \$300,000, the policy allows
2 such a distribution.

3 Again, resolution of this issue requires application of
4 insurance law and interpretation of the terms of the insurance
5 policy.

6 **THIRD ISSUE¹**

7 It is readily apparent that the underlying issue is whether
8 policy proceeds should be distributed in accordance with the
9 provisions of the policy which contemplate a "first come, first
10 paid" distribution or whether policy proceeds should be distributed
11 on a pro rata or some other equitable basis. This issue is the
12 heart of the interpleader litigation.


13 On October 7, 2005, this Court recommended to the District
14 Court that the reference be withdrawn and the three interpleader
15 actions be litigated before the District Court. The District Court
16 has not yet ruled on the withdrawal of reference. Pending that
17 ruling, this Court continues to have jurisdiction to adjudicate the
18 interpleader actions. Fed. R. Bankr. P. 5011(c). Should this
19 Court address the merits of the pending request to distribute
20 insurance policy proceeds, it would necessarily be interpreting
21 insurance policy provisions which, if the reference is withdrawn,
22 would also be relevant to issues to be determined by the District
23

24 ¹This Court will soon be reviewing a proposed procedure which
25 would lift the automatic stay for all claimants to allow claimants
26 to file appropriate pleadings in the interpleader actions and seek
27 distribution of policy proceeds in the interpleader actions. The
28 purpose of such a "blanket" lifting of the stay is to alleviate the
burden of proceeding in the Chapter 11 or Chapter 7 cases prior to
litigating each claimant's right to proceeds in the relevant
interpleader action.

1 Court. This is inadvisable. Should this Court decide the merits
2 of the pending request for distribution of insurance proceeds, it
3 would be indirectly addressing the issue which lies at the heart of
4 the interpleaders. Allowing distribution to Mr. Turner at this
5 time would infer and indirectly be a de facto "first come, first
6 paid" resolution of the primary dispute in the interpleader
7 actions. If this Court determined that no distribution should
8 occur, it would infer and indirectly be a de facto "equitable
9 distribution" resolution of the primary dispute. Any decision on
10 the merits of the pending request for distribution has significance
11 in the resolution of the primary underlying issue prior to the
12 identification of the Court which will decide that issue. It is
13 inadvisable to make such a determination at this time.

14 As mentioned above, Mr. Turner has filed pleadings in
15 adversary No. 05-80135-PCW procedurally sufficient to support a
16 request for distribution. The automatic stay is lifted to allow
17 Mr. Turner to take all actions necessary to resolve that request in
18 the interpleader action once the District Court has ruled on the
19 withdrawal of reference. The request should then be made promptly
20 before the applicable Court.

21 DATED this 21st day of October, 2005.

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24 PATRICIA C. WILLIAMS
25 Bankruptcy Judge
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